NTSB Order No.
EM-86

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 14th day of April, 1981.

JOHN B. HAYES, Commandant, United States Coast Guard

vs.

WILLIAM TINGLEY, Appellant.

Docket No. ME-80

OPINION AND ORDER

Appellant seeks review of the Commandant's decision affirming the suspension of his license (No. 432240) for negligent pilotage of the SS PORTLAND. Previously, appellant has appealed to the Commandant (Appeal No. 2174) from the initial decision of Administrative Law Judge Roscoe H. Wilkes, entered after a full evidentiary hearing.[1] Throughout these proceedings, appellant has been represented by counsel.

The negligence charge was comprised of specifications alleging that appellant's imprudent navigation and failure to ascertain the correct state of the tide, arriving inbound from Cook Inlet at the port of Anchorage, Alaska, caused the vessel's collision with the Anchorage City Dock on October 20, 1976. The law judge found that appellant had relied on the previous day's high tide forecast in calculating that the tide would be ebbing as the PORTLAND made its approach from the south for a starboard landing;[2] that, in fact, it was about 25 minutes before high tide and the current was still flooding; and that the flooding tide, in turn, was causing the vessel to accelerate above the normal speed used for such approaches. He further found that when appellant realized this and aborted the landing, the PORTLAND was passing its assigned berth and in danger of colliding with the tug KNIK WIND moored

[1]Copies of the decisions of the Vice Commandant (acting by delegation) and the law judge are attached. 33 CFR 1.01-40.

[2]The dock is located along the eastern shore of Knik Arm, a northerly extension of Cook Inlet, with berthing terminals aligned in roughly a north-south direction (I.D. 12).

approximately 250 feet ahead at the next berth; and that in taking evasive action to avoid the tug, the PORTLAND struck the dock causing extensive damage and knocking a shore crane "into a position where it was hanging and dangling over the water" (I.D. 16).

In addition to making "highly erroneous and useless calculations" of the tide and the resulting current (I.D. 17), it was found that appellant "should have been altered to his error with an opportunity to correct it [at an earlier stage], had he been more careful" (I.D. 36). Upon concluding that both charges were established as factors contributing to the casualty, and taking into account a similar offense on appellant's past record, the law judge suspended his license for a period of 3 months.[3]

In his brief on appeal, appellant contends that (1) the law judge erroneously denied a timely motion to dismiss the charge of imprudent navigation; (2) a decision of the Coast Guard not to seek immunity for the master of the PORTLAND was a denial of due process; and (3) the offense was misclassified in the selection of an appropriate sanction. Counsel for the Commandant has filed a brief in opposition.[4]

Upon consideration of the briefs and the entire record, we conclude that the findings of the law judge are supported by reliable, probative, and substantial evidence. We adopt the above recited findings as our own. Moreover, we agree that the sanction is warranted.

The law judge ruled correctly, in our view, that the presumption of fault against a moving vessel striking a stationary object nullified any objection that the charge of imprudent navigation was vague and uncertain. In Admiralty law the presumption rests on the commonly accepted fact that such damage is not ordinarily done by a vessel under control and properly managed. It has the effect of a prima facie case, placing the burden on the owners of the vessel to rebut the inference of negligent

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[3]The suspension order is stayed pending the disposition of this appeal. 46 CFR 5.30-35(d).

[4]A supplemental brief filed by appellant in reply to that of the Commandant has also been considered. His further request for oral argument is denied. 46 CFR 825.25.

navigation.[5] We see no reason for exempting the vessel's navigator in a disciplinary proceeding from the rules governing civil litigation in the same type of case.[6] The pleading served notice that the Coast Guard intended to rely on the presumption, if necessary, to prove its case and provided appellant with an opportunity to prepare his defense on that understanding.[7] We find no error.

We are also persuaded that the Coast Guard acted within the limits of a reasonable policy in declining to immunize the master of the PORTLAND from criminal prosection. The issue arose when the master, called by appellant as a witness and after being sworn, made the claim through his counsel that he might be required to give evidence which could be used to charge him with a crime.[8] He was excused without testifying and a procedure designated as Commandant's Instruction No. 5904.6 was followed to obtain his testimony under a grant of statutory immunity.

The general immunity statute (18 U.S.C. 6001 et seq.) provides that a witness invoking the privilege against self-incrimination at any proceeding before an agency of the United States may be ordered to testify, with the approval of the Attorney General, if in the agency's judgement "the testimony... may be in the public interest". 18 U.S.C. 6004. This confers "use" immunity on the witness as provided in 18 U.S.C. 6002; that is, neither the testimony nor any information derived from it, directly or indirectly, may be used against him in any criminal case except a prosecution for perjury, making a false statement, or otherwise failing to comply with the order.

The Commandant's instruction is confined to cases where the witness asserting the privilege is the only source of information other than the person charged. In accordance with this policy, the

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[5] Patterson Oil Terminals v. The Port Covington, 109 F. Supp. 953 (E.D. Pa. 1952), aff'd 208 F.2d 694 (3d Cir. 1953).

[6] Commandant v. Pierce, NTSB Order No. EM-81, adopted August 28, 1980.

[7] The law judge ultimately found that the Coast Guard met its burden of proof without aid of the presumption (I.D. 35).

[8] Particular reference was made to the criminal penalties authorized by the Federal Boat Safety Act (a $1,000 fine or imprisonment for 1 year, or both) against any person who uses a vessel in a grossly negligent manner so as to endanger the life, limb, or property of another. 46 U.S.C. 1461(d), 1483.

chief counsel of the Coast Guard determined that it was not in the public interest to compel the master's testimony "in light of the fact that there are other witnesses that can testify as to the events that transpired on the bridge..." (I.D. 32). The immunity statute, in plain terms, authorizes the agency conducting the proceeding to make the public interest assessment, subject to the veto power of the Attorney General. Obviously, this authority is not intended to be used indiscriminately[9] but in the sound exercise of the agency's discretion. It is not enough to argue, as does appellant, that the Coast Guard "had nothing to lose" by granting immunity to the master. The statute is designed solely to serve the government's need for information rather than the interest of persons prosecuted by the government.[10] Courts have held that "a defendant might be denied due process if the government uses it authority to seek immunity for its own witnesses, but declines to do so on behalf of the defendant."[11] Applying this test the Coast Guard action clearly did not violate due process. We have found no precedent or other authority, and appellant cites none, which would support a contrary holding. Hence, the second contention is rejected.

Appellant argues in the alternative that the law judge should have excluded hearsay statements attributed to the master for negligent navigation as well as appellant. Appellant's own statements at the time showed that by mistaking the date of arrival for the previous day he had miscalculated the time of high tide to be an hour earlier than it actually was; and the master had acknowledged that, in approaching the dock, the PORTLAND was caught "in a tidal current that he had never experienced before in his 2 1/2 years of coming into Anchorage...", and that he has reacted too late in deciding to pull out of the approach (Exh. 17, Tr. 257). Such admissions against interest by a witness refusing to testify on the basis of his privilege against self-incrimination are

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[9]One of the primary concerns of the statutory enactments in this area, past and present, has been the elimination of abuses in the form of "immunity baths" for witnesses testifying at nonjudicial proceedings. See Comment on Immunity ProvisionS, Vol. II, pp. 1406-1409, Working Papers of the National Commission on Reform of Federal Criminal Laws (1970).

[10]United States v. Herman, 589 F.2d 1191 (3d Cir. 1978), sert. denied, 441 U.S. 913 (1979).

[11]United States v. Allessio, 528 F.2d 1079, 1081 (9th Cir. 1976), cert. denied, 426 U.S. 948 (1976); Earl v. United States, 361 F.2d 531 (D.C. Cir. 1966), cert. denied, 388 U.S. 921 (1967).

admissible as an exception to the hearsay rule.[12]

Finally, appellant contends that the sanction be an admonition for inattention to duty as compared with the suspension ordered by the law judge on a finding of negligence. The offense are considered to be "essentially the same" by definition in one Coast Guard regulation[13] but another regulation containing the scale of average orders indicates that inattention to duty is simply the lesser of two offenses having the same elements.[14] Based on our review of the record, appellant's various acts and omissions represented a serious breach of duty on the part of a ship's pilot. His fault consisted not only in misreading the tide tables which caused the vessel's excessive rate of speed but in his failure thereafter to take routine precautions, such as slowing down sufficiently to observe the current's effect on the vessel or communicating by radio with personnel at the dock to determine its direction, which might have enabled him to discover the error and take corrective action well before the point where the collision was, for all practical purposes, unavoidable. We agree with the law judge that these "actions fell short of what can reasonably be expected of a prudent pilot" (I.D. 36).[15] The sanction is commensurate with the degree of the offense and the need to "instill in appellant a regard for the importance of greater caution in the future".[16]

ACCORDINGLY, IT IS ORDERED THAT:

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[12]5 Wigmore, Evidence §1456 (Chadbourn rev. 1974). The initial decision noted that the master was charged by the Coast Guard in a separate case "[f]ollowing these conversations" (I.D. 27), although that case was later withdrawn and never prosecuted.

[13]46 CFR 5.05(a)(2).

[14]The sanctions listed for a second offense of ordinary negligence (i.e., neglect of duty) in Groups B and D of the scale are suspensions from 6 and 12 months respectively. See 46 CFR 5.20-165.

[15]"A pilot is employed because he is presumed to have knowledge of the tides and currents and their effects upon the ship and all other dangers affecting the safety of the vessel due to local conditions". The Framlington Court, 69 F.2d 300, 304 (5th Cir. 1954).

[16]Commandant v. Hardsaw, NTSB Order No. EM-76, adopted September 25, 1979.

1. The instant appeal be and it hereby is denied; and

2. The orders of the Commandant and the law judge suspending appellant's license No. 432240 for 3 months be and they hereby are affirmed.[17]

KING, Chairman, McADAMS and GOLDMAN, Members of the Board concurred in the above opinion and order. BURSLEY, Member, did not participate and DRIVER, Vice Chairman, was absent.

[17]In a subsidiary argument appellant questioned whether he was acting "under the authority" of his license in this case. We are in no doubt that a pilot's endorsement for "the waters of southeastern and southwestern Alaska", which he held, encompassed the geographical area of Cook Inlet, Knik Arm, and the port of Anchorage, Alaska; and that he was acting within the scope of his license at all times while piloting the SS PORTLAND.